RECORD AND BRIEFS

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No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., AND JACK C. PHILLIPS,
PETITIONERS,

v.

COLORADO CIVIL RIGHTS COMMISSION; CHARLIE CRAIG; AND DAVID MULLINS,
RESPONDENTS.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF *AMICI CURIAE* UNITED STATES SENATORS AND REPRESENTATIVES IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Petitioner Jack Phillips is an artist in cake and icing. His works require skill, ingenuity, and even the application of brush to cake. See Figs. A-C, Appendix B, at Appx. 3-4 (pictures of Phillips' work and process).

Phillips is also one of the many Americans with religious beliefs who "advocate with utmost, sincere conviction that, by divine precepts," traditional marriages are "central to their lives and faiths." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2607 (2015). As such, Phillips relies on this Court's promise that the First Amendment will afford him "proper protection" as he tries to live and work peacefully within "the principles that are so fulfilling and so central to [his] li[fe] and faith[]." *Ibid.*

In this case, Phillips and his small business declined Respondent Mullins and Craig's 2012 request to "design and create a cake to celebrate their same-sex wedding." *Craig* v. *Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 276 (Col. App. 2015). Phillips would sell anyone any pre-made cake or good in his shop,

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[1] Pursuant to Supreme Court Rule 37.3(a), *amici curiae* certify that Petitioners and Respondent Commission have given blanket consent to the filing of *amicus* briefs and Respondents Craig and Mullins have given written consent to the filing of this brief. Pursuant to Rule 37.6, counsel for *amici curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

but he would not custom design same-sex wedding cakes because of his religious beliefs. *Ibid.*

The Colorado Court of Appeals has ordered Phillips to "cease and desist from discriminating" under the Colorado Anti-Discrimination Act ("CADA"), by which it means that Phillips must accept such requests to celebrate. *Id.*, at 286. The Commission ordered Phillips to rewrite his company policies and to pay for and conduct "comprehensive staff training," *id.*, at 277, so that no similar request is refused in the future. He must make quarterly compliance reports for two years about his remedial and retraining measures, and must log the number of customer celebrations he declines and the reason why. *Id.* Yet in all of this compelled speech, the court saw no violation of Phillips' First Amendment rights under the Free Speech or Free Exercise Clauses. *Id.*

This case, then, involves more than a clash between the non-discrimination claims of Craig and Mullins and the First Amendment freedoms of Phillips. *Contra id.*, at 276. The more fundamental question is the power of a government to compel Americans to frame or speak messages against their conscience. For if the government can compel a religious person to make artistic designs for events that conflict with their religious beliefs, there is little speech the government cannot compel.

The undersigned *amici curiae*, Members of the United States Senate and House of Representatives (listed in Appendix A), believe that whenever legislation attempts to compel violations of Americans' constitutional freedoms of speech and religious conscience, government should have to establish a case-specific, compelling interest or otherwise satisfy

strict scrutiny. *Amici* also believe the rule below would trample the rights of all Americans, by placing a special burden on those Americans trying to earn a livelihood consistent with their religiously informed consciences.

Such an outcome is of great concern to *amici*, as Members of Congress who are committed to free speech and religious liberty. *Amici* may hold a variety of views about same-sex marriage. They are united, however, in their concern about the lower court's misinterpretation of the First Amendment in a way that would permit government to compel expression and action contrary to religious conscience.

SUMMARY OF ARGUMENT

Petitioner Phillips' story illustrates the extent to which some courts are willing to condone or facilitate compelled speech and action, even where it violates the conscience of the speaker.

Notwithstanding the extensive artistry that would be required by Mr. Phillips, see Figs. A-C, Appendix B (showing Mr. Phillips at work), the court below concluded that Petitioners' artful cakes did not communicate anything to the public at large.

The Colorado Court of Appeals sought to avoid the obvious free speech problems by holding that designing a custom cake is not expressive, *id.*, at 288, and saying a design "does not convey a celebratory message about same-sex weddings likely to be understood by those who view it." *Id.*, at 286. Instead, the lower court suggested observers of Phillips' work should know and see that art through a particular framing, namely that it is "a reflection of [a] desire to conduct

business in accordance with Colorado's public accommodations law." *Id.*, at 287.

Because the Colorado Court of Appeals found that Phillips' design work was not expressive, it found that government *need not show any important interest* in order to compel artistic designs. *Id.*, at 288.

Further, while the Free Exercise Clause should operate to protect Phillips, the lower court held that *Employment Division* v. *Smith*, 494 U. S. 872, 882 (1990) foreclosed Phillips' claim, because the Colorado law was a neutral, generally applicable law subject to rational basis review. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 293 (Col. App. 2015).

These *Amici* are concerned by the lower court's use of public accommodation legislation to make Mr. Phillips' messages a public good. Legislators are often asked to vote on measures designed to increase access in the marketplace. In *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U. S. 557, 572 (1995), this Court noted a problem when public accommodation laws are applied in a "peculiar" way, where a contingent of individuals could claim a legal right to shape the messages of a public accommodation. The lower court magnifies the error rejected in *Hurley*. If allowed to intrude on the conscience of business owners, government would threaten more than a few holiday parades; it would allow Americans to be put to a choice between their conscience and their livelihood. This is the kind of burden on religious exercise that should receive strict scrutiny. See *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2021 (2017).

The Constitution does not allow Petitioner Phillips to be forced from the marketplace so easily. The lower court should be reversed, and the strong protections of the First Amendment rights of speech and free exercise of religion be upheld.

ARGUMENT

Government (and its courts) may not compel any speech contrary to the speaker's will. The lower court used a cramped, constricted meaning of "speech" under the First Amendment; as explained below in point I, the resulting rule will compel artists like Petitioner Phillips to design celebratory works against their will.

Further, government (and its courts) may not coerce speech or action in conflict with the speaker's religiously informed conscience, without satisfying strict scrutiny. The lower court tried to avoid grappling with this Free Exercise Clause issue through a too-broad reading of *Employment Division* v. *Smith*, 494 U. S. 872, 882 (1990). The result puts Petitioner Phillips to a choice between his faith and his ability to conduct business. As explained below in Point II, the Colorado Court impermissibly subjected Phillips' free exercise of religion to a burden, without subjecting that burden to strict scrutiny.

If left uncorrected, these two errors will erode the First Amendment rights of all Americans.

The lower court did not appreciate how far it had intruded into the framing of Phillips' speech. But the depth of the intrusion is shown by imagining the opposite case. In this case, two patrons asked for "a cake to celebrate" their wedding. *Craig* v. *Masterpiece Cakeshop, Inc., supra*, at 276. What if the facts were

that a patron had asked for a custom cake designed to *oppose* a wedding? Would the lower courts find that a "cake to denigrate" rather than a "cake to celebrate" has no expressive message under the First Amendment? If a shop were forced to decorate such a cake, would it be any balm to be told that the public would interpret the design as "a reflection of [the designer's] desire to conduct business in accordance with Colorado's public accommodations law?" *Craig* v. *Masterpiece Cakeshop, Inc.*, *supra*, at 287.

Of course not. In fact, Respondent Commission faced three such cases, where a Colorado man requested cakes opposed to same-sex marriage. App. to Pet for Cert. 326a, *et seq.* (Commission's rulings in *Jack* v. *Azucar Sweet Shop & Bakery*, *Jack* v. *Le Bakery Sensual, Inc.*, and *Jack* v. *Gateaux, Ltd.*). Each decorator refused, because they saw the request as a *message* in conflict with their conscience. Respondent Commission had no difficulty labeling the request a message to be rejected by a designer, rather than a rejection of religious persons. See *id.*

But if a critical cake carries a message, so too does a cake to celebrate; both should be subject to the same rules. Instead, Mr. Phillips has been singled out, because the Commission does not like his message. It is no answer to say that Americans should expect government to control the framing of commercial speech. As this Court has recently held, a law compelling a particular framing of a commercial message is not incidental, it is unconstitutional. *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1151 (2017).

As shown below, Mr. Phillips' custom cake designs are speech, and any reasonable First Amendment

analysis of these facts should be subject to strict scrutiny when challenged under either the Free Speech or Free Exercise Clauses.

I. Phillips' artistry on a celebratory custom wedding cake is speech, and any limitations on it are subject to strict scrutiny, which the Colorado Court of Appeals failed to apply.

"The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977).

Does the selection, creation, and decoration of a custom wedding cake carry ideas or points of view? The Colorado Court of Appeals suggests the answer is "no," at least not until a patron and artist start talking about design elements. *Craig* v. *Masterpiece Cakeshop, Inc.*, *supra*, at 288.

This misunderstands, at a basic level, the nature of cakes, weddings, and custom designs; a "cake to celebrate their same-sex marriage" is artistic *speech*. *Id.*, at 276. Asking an artist to especially design a cake to capture the appropriate emotions of a wedding day is more than a request for a food with flour, eggs, and sugar. It is more than a raw ingredient for symbolic expression. At the point of the request, it is a request for a message.

Moreover, the Colorado Court misapplies this Court's prior precedents, because it finds designing a wedding cake is no more expressive than an email alerting students to an on-campus military recruiter or wearing a school uniform.

Finally, as Colorado admits it would apply the same rule even to "fine art painters," App. to Pet for Cert. 332a–333a, the legislative scheme here reveals itself to be a scheme for compelling the government's preferred messages in art. *Amici*, as legislators, believe the scheme should be judged (and felled) under strict scrutiny, to protect the free speech rights of all Americans.

A. Artistic design on a custom wedding cake is protected, First Amendment speech.

The Colorado Court of Appeals faced a central question: does a custom designed wedding cake carry meaning; is it speech?

Applying this Court's precedents, artwork has been classified as pure speech by lower courts. "Artist[s] practicing in a visual medium" are creating pure speech protected by the First Amendment. *Buehrle* v. *City of Key West*, 813 F. 3d 973, 978 (11th Cir. 2015).

The Colorado Court of Appeals, however, suggests there is not even *symbolism* in a decorated cake. *Craig* v. *Masterpiece Cakeshop, Inc.*, *supra*, at 285–286, 288. It agreed with the Administrative Law Judge who decided that Phillips' work "involves skill and artistry, but nonetheless concluded that, because Phillips refused to prepare a cake for Craig and Mullins before any discussion of the cake's design, the ALJ could not determine whether Craig's and Mullins' desired wedding cake would [be] ... subject to First Amendment protections." *Id.*, at 286. On this basis, it concludes that Colorado needs no important reason to make Phillips design and produce a cake. *Id.*, at 289, 293–294. Even at this level, the lower

court's decision is intuitively wrong. Marie Antoinette would surely beg to differ about the absence of symbolism in "just" cake; historians might argue that "let them eat cake" was an unfair slander of her memory, but no one argues the idea of cake in that utterance was meaningless. Cake carries within itself a message of bounty and plenty.

This case, of course, goes beyond a cake. The Colorado Court's opinion, from the beginning, acknowledges that Petitioners Craig and Mullins asked Phillips to "...design and create a cake to celebrate their same-sex wedding." *Id.*, at 276. Like layers of a tiered cake, each word adds more and more evidence of meaning, and therefore, speech.

Society recognizes the communicative nature of *designed* cakes. Commissioning a cake design is not a mere labor-saving device; patrons recognize the special artistic and communicative talents necessary for decorating cakes. Without training and tools, few can copy the artistry of a professional designer. In popular culture, the "Cake Wrecks" blog has documented cakes badly or poorly decorated – playing on the common fear that the artist's work will communicate the wrong message. Like a scary movie, we imagine what if it were our wedding[2], our friends[3], our graduation[4] or our holiday celebration[5] where the

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2 http://www.cakewrecks.com/home/2008/7/10/inspiration-vs-perspiration.html (last accessed August 21, 2017).

3 http://www.cakewrecks.com/home/2008/5/20/the-cake-that-started-it-all.html (last accessed August 21, 2017).

4 http://www.cakewrecks.com/home/2010/6/11/we-learned-good.html (last accessed August 21, 2017).

5 http://www.cakewrecks.com/home/2008/12/17/seasonal-non-sequiturs.html (last accessed August 21, 2017).

message was wrong or even socially offensive. *Cake designs* almost demand to be interpreted by the viewer; viewers' instincts tell them to see a message by the artist in the work.

Even more meaning is implied in the request for a design "celebrat[ing]" an event. A design of celebration at the wrong time or place can result in hurt feelings and damaged relationships. Phillips could refuse to send a celebratory cake design to a funeral, recognizing it to be an event that usually does not call for celebration. A design/event combination almost always conveys a meaning; must a Democrat-owned cake shop produce cakes that "celebrate" the GOP? Must a Muslim-owned shop produce a cake for a Christian Resurrection Vigil? In each case, a "design to celebrate" an event carries a speech message.

Americans may be divided over whether or not a same-sex marriage should be celebrated, as this Court recognized in *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2607 (2015). But this Court has already said such disagreements are not based in animus toward gay and lesbian Americans. This Court also recognized that such disagreement was often "based on decent and honorable religious or philosophical premises...," *id.*, at 2602, and a position held by "people of good faith," *id.*, at 2607. Dealing with Phillips' good faith objection, the Colorado Court should have protected his decision about whether or not to produce a celebratory cake for a particular event.

But, this cake design is even more clearly speech protected by the First Amendment, for this is a celebratory *wedding* cake. It does not take a social science degree to understand that wedding cakes are laden with messages about the wedded couple, their

hopes, and their identities. For example, take this description of the 2012 wedding cake of the Duke and Duchess of Cambridge:

> Along the cake's base ran ivy leaves, symbolising marriage, and the bottom three tiers were decorated with piped lace work and daisies, meaning innocence, sweet William - grant me one smile - and lavender.
>
> There were infill features of cascading orange and apple blossom, honeysuckle, acorns with oak leaves - meaning strength and endurance - and bridal rose, which symbolises happiness, and myrtle.
>
> The fourth tier featured the intricate garlands, reflecting the architectural details in the room, and above this was another cake covered with lattice work and piped leaf detail.
>
> Lily of the valley - representing sweetness and humility - covered the sixth tier which also had an artistic interpretation of the couple's cipher - their initials intertwined below a coronet.
>
> The four flowers of the home nations - English rose, Scottish thistle, Welsh daffodil and Irish shamrock - were featured on the penultimate tier and the top cake, around six inches in diameter, was covered with lace details with a

garland of lily of the valley and heather on top.[6]

In the unlikely event that the then Kate Middleton had asked a Colorado anti-monarchist about his availability for designing a wedding cake, the designer would immediately understand the kind of messages expected. It seems difficult to imagine the Colo-Colorado Court of Appeals telling that designer that further consultation would be necessary to know whether Ms. Middleton had any particular messages in mind.

In fact, society so expects customized messages in wedding cakes, deviating from expectations in the tiniest way is often seen as a message about the parties. The cake's message transcends food. Even at the opposite end of the spectrum from the Duke and Duchess of Cambridge, where the new spouses "just" serve cupcakes, or "just" serve a plain sheet cake from a warehouse club, there is a meaning communicated about the wedded pair.

Further, Phillips' refusal to design and create the cake is also a message, just as expressive. Phillips would sell any product in his store to any patron who entered, including a pre-made cake. However, he would not accept every commission, or celebrate every event. For example, he has declined to create cakes with messages he finds hateful, vulgar or profane, as well as requests to celebrate events or ideas that violate his beliefs, including "anti-American or anti-family themes, atheism, racism or indecency."

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6 http://www.dailymail.co.uk/news/article-1381944/Royal-Wedding-cake-Kate-Middleton-requested-8-tiers-decorated-900-flowers.html (last accessed August 21, 2017).

Pet. at 5–6. Neither will he do cakes celebrating Halloween (a potentially lucrative holiday). *Id.* These limits are also an expression of Phillips' religious beliefs, showing what he supports by showing what he will not support.

Cakes are expressive. *Designed* cakes are intended to be more expressive. *Celebratory event* cakes carry even more meaningful designs. But wedding cakes primarily exist to express hopes and dreams for the couple's rich future; they speak of what is important about the couple, their families, or even their nations; there can be no doubt that custom wedding celebration designs, even when executed in in cake and icing, are not just a snack, and not just a symbol of legal marriage, but a message-bearing form of speech.

If Colorado can compel a design of celebration from an artist, in a medium imbued with emotional, religious, and cultural messages, it must be subject to strict scrutiny under the First Amendment. Whether the compelled design promotes a "progressive" value, a "conservative" value, or something in between, the Colorado Court of Appeals was incorrect when it found this kind of artistry to be "non-expressive." Mr. Phillips' artwork is pure speech.

B. Phillips' speech is not like the non-expressive conduct in the cases cited by the Colorado Court of Appeals.

The Colorado Court of Appeals claims to have decided that celebratory wedding cake designs are non-expressive because of cases like *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006).

To highlight the message-bearing nature of Mr. Philips' speech, it is worth considering how inapplicable *Rumsfeld* is to this situation. Mr. Phillips' cake designs are far more meaningful to him[7] and others than the conduct in *Rumsfeld*, which shows that Phillips' artistry is expressive speech protected by the First Amendment.

In *Rumsfeld*, a group of law schools disagreed with Congress's then-exclusion of gays and lesbians from the military. *Id.*, at 51. Congress had also required universities to provide campus access for military recruiters "equal in quality and scope to that provided to other recruiters." *Id.*, at 53. Failure to provide the access made an institution ineligible for federal funds. *Id.*, at 54. The schools sued, arguing "forced inclusion and equal treatment of military recruiters violated the law schools' First Amendment freedoms of speech and association." *Id.*, at 53.

The lower court in *Rumsfeld* had identified three constitutional issues; this Court described two as allegations of coercing speech, and a third argument

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[7] *Amici* agree with Petitioner that whether *speaker's* desired message has been changed is more important to the First Amendment than whether or not a third-party is likely to perceive the change or understand a separation between the speaker and another party. Br. at 30. Thus, in *Wooley* v. *Maynard*, 430 U.S. 705 (1977), this Court affirmed that a state motto on a license plate was unconstitutional compelled speech; Justice Rhenquist, in dissent, noted the affirmation rested on a decision by a state court that a license plate carries no implication of endorsement, *id.* at 722, *citing State* v. *Hoskin*, 295 A.2d 454, 457 (N.H. 1972). *See also Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006) (compelled-speech violations result from interference with a speaker's desired message).

involving expressive conduct. See *id.*, at 60–61. First, the schools complained that they were forced to send the government's message, because they may have to send factual emails along the lines of "the U. S. Army recruiter will meet interested students in Room 123 at 11 a.m." *Id.*, at 62. The schools also argued that "by forcing law schools to permit the military on campus to express its message, the Solomon Amendment unconstitutionally requires law schools to host or accommodate the military's speech." *Id.*, at 61. Third, the schools complained the exclusion was forcing them to engage in "expressive conduct." *Id.*, at 62.

This Court ruled against the schools. *Id.*, at 70.

Consider how Phillips' situation is different from the situation in *Rumsfeld*, at all three points.

> 1. Where *Rumsfeld* approved incidental, factual emails about a recruiter's presence on campus, Philips would be compelled to create designs to celebrate same-sex weddings, rewrite his internal policies, and train staff to participate as celebrants in such events.

This Court concluded that the factual emails about the military recruiter, incidental to campus visits, were not a compelled government message. "There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse." *Id.*, at 62.

Rumsfeld's brevity may hide the depth of its reasoning. In *Rumsfeld*, the law compelled access to a facility, *id.*, at 60, which might result in a school incidentally using truthful words about that compelled conduct (again, akin to "a military recruiter will be

here"). *Id.*, at 62. The schools did not claim the words were incorrect or a matter of arguable opinion, but that the access resulted in "compelled statements of fact." *Ibid.* If the law required the recruiter to be let into the building, it was incidental that the schools said might communicate the true fact that a recruiter is in the building. The schools were not forced to say "we celebrate that military recruiters are here," and the recruiter had no new ground to tell students "your school celebrates the military." The school might wish that the recruiter was not on campus, but it was free to say so, *id.*, at 65. The message in the incidental communication was true. The Court held that this "speech" had not changed the schools' message, was not the government's message, and was nothing like the compelled pledge of allegiance or recitation of a government motto. *Id.*, at 62.

In this case, of course, the government-mandated conduct is not mere access to a facility, or even selling goods available to the public. Phillips has no qualms about allowing Respondents access to his store, or selling them goods like any other customer. In fact, *amici* are unaware of any reported case against a small business where the religious owner has seriously—suggested they refuse, categorically, to deal with gay and lesbian Americans. Florists are not asking to refuse birthday flowers. Photographers are not asking to refuse to do holiday or graduation photos. Wedding venues are not claiming a right to exclude gay or lesbian guests or attendants from their property. This reinforces this Court's point in *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2594 (2015), that these disagreements come from good faith and honorable differences about the best way to achieve the common

good. This common good includes gay and lesbian Americans, and does not seek to exclude them from owning businesses or buying goods.

In contrast to *Rumsfeld*, the amount of government-ordered speech in this case is far greater, more intrusive, and a matter of disagreement on a matter of good faith, public debate: Phillips is being ordered to "cease and desist" from his conduct, which was refusing to "...design...a cake to celebrate...same-sex wedding[s]." *Craig v. Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 276 (Col. App. 2015). Phillips is also ordered to make "alteration[s]" to the company's internal policy documents, and to pay for "comprehensive staff training." *Id.*, at 277. Phillips is required to make the government message appear in his own cakes designs, business policies, and staff training.

In *Rumsfeld*, *supra*, at 62, the allegedly compelled speech was an incidental statement of fact about the time and place of the required conduct. Here, the content of the compelled speech is not strictly *factual*; the cease and desist order asks Phillips to make celebratory speech. *Craig*, *supra*, at 277. A wedding cake is not a mere factual statement; it says more than "a legal wedding is here." Phillips does not deny the fact of Craig and Mullins's wedding, or its legality. But he does have religious beliefs about his complicity in *giving messages as a celebrant*, allowing others to portray him as a co-celebrant, writing new business policies that make his business a celebrant, or training his employees to be celebrants.

Thus, an intricate design on a celebratory wedding cake is a far cry from "[t]he U. S. Army recruiter will meet interested students in Room 123 at 11 a.m."

Rumsfeld, supra, at 62. The message of the wedding and wedding cake expresses aspirations and ideals, far closer the intent of the pledge (...indivisible, with liberty and justice for all") in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), or the motto ("live free or die") in *Wooley* v. *Maynard*, 430 U.S. 705 (1977). The 9th Circuit has previously said it is "easy to discern" a "particularized message" in wedding celebrations; "[w]edding ceremonies convey important messages about the couple, their beliefs, and their relationship to each other and to their community." *Kaahumanu* v. *Hawaii*, 682 F. 3d 789, 799 (9th Cir. 2012); see also *Ctr. for Inquiry, Inc.* v. *Marion Circuit Court Clerk*, 758 F. 3d 869, 875 (7th Cir. 2014)("[a] marriage solemnized by a self-declared hypocrite would leave a sour taste in the couple's mouths; like many others, [they] want a ceremony that celebrates *their* values....").

In finding that designed cakes are *not* speech, the Colorado Court of Appeals suggests Congress could also have forced law schools to design and create celebratory cakes for the recruiter, or to rewrite internal policies to further the recruiter's celebratory message about the military, or even to train their staff to join in a celebration of the military. *Rumsfeld* does not support the Colorado Court's decision to impose celebratory speech about a marriage on Mr. Phillips.

2. Recruiting programs, like those in *Rumsfeld*, are forums for conflicting, independent voices that make student job-hunting more efficient; in contrast, a wedding cake and celebration focus on celebratory message(s) about the new spouses.

Where *Rumsfeld* said students "can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so," the Colorado Court of Appeals suggests it is following the same pattern to say:

> ...it is unlikely that the public would view Masterpiece's creation of a cake for a same-sex wedding celebration as an endorsement of that conduct. Rather, we conclude that a reasonable observer would understand that Masterpiece's compliance with the law is not a reflection of its own beliefs.

Craig v. Masterpiece Cakeshop, Inc., supra, at 286, *citing Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U. S. 47, 65 (2006).

However, the recruiting context in *Rumsfeld* is different than the wedding celebration here. In allowing on-campus recruiting, the school is providing an opportunity for multiple, independent messages, whether the recruiters are on campus together or *seriatim*. No one suggests a recruiter is speaking the message of the school, and they are not speaking the message of other companies. One benefit of on-campus recruiting is to lower the cost of hearing these competing messages, so that the student may winnow the choices. Do the law student's own goals align better with Cravath or Morrison & Foerster? Lambda Legal or the JAG corps? Apple or Mi-

crosoft? It is an economic tournament, fostered by competing ideas.

A wedding is not intended by the spouses as a tournament of multiple, competing messages. It may include many people, but it is one message, about them. The fear of a competing message at the altar or reception is a matter for comedic or dramatic tension in movies. The appearance of a rival suitor or disapproving parent at "speak now or forever hold your peace" is not a jaunty addition to the couple's open tournament for loving commitment. It is at least a social *faux pas*, if not a social horror, to contradict, upstage, or downplay the celebration on "their day." It is more like a parade than a tournament; indeed, some cultures do parade the bride, groom, friends, and family as part of the wedding celebration.

The other cases from this Court that are cited by the Colorado Court of Appeals share the tournament idea, inside a competitive forum. In such contexts, the addition of another competitor did not change the message of the speaker. *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 841–42 (1995), held that a student newspaper was not likely to be mistaken for the university's speech when supported by a student activity fee; the fee was meant to allow students to create multiple, competing messages. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 655 (1994), involved a cable system with multiple channels, with multiple programs, and multiple advertisers, often with competing messages; the cacophony of broadcast TV meant viewers would not assume that the cable system conveys ideas or messages endorsed by the cable operators. Finally, *PruneYard* v. *Rob-*

bins, 447 U. S. 74 (1980), involved a large shopping center with more than 70 businesses competing for the attention of 25,000 daily customers; the decision specifically excluded individuals and small businesses, like Mr. Phillips' family business. *Id.*, at 78. See also *Board of Education of Westside Community School* v. *Mergens By & Through Mergens*, 496 U.S. 226 (1990)(Student-led Bible club allowed where public high school allows student-led extracurricular clubs).

Unlike a recruiting fair, student activity program, cable network, or shopping center, neither Mr. Phillips' business nor Mr. Craig and Mr. Mullins's wedding is a tournament involving competing messages.

> 3. Wedding cakes contain an inherent meaning about the wedding, unlike the presence of any particular recruiter in *Rumsfeld*.

In *Rumsfeld*, the law schools suggested they were being compelled to engage in expressive conduct. *Rumsfeld*, *supra*, at 62. This Court held the conduct compelled was not expressive; the exclusion of the recruiter conveyed no message, and the compelled addition did not add a new message. *Id.*, at 66. But, again, this hinged on the context of a recruiting program. One more competitor in a tournament is not an endorsement of the new competitor. It does not change the meaning of anyone's message to post a sign outside the recruiting fair that "the presence of a recruiter does not imply endorsement by this school." That only makes obvious what most people would assume.

Weddings do not welcome competing messages.

Custom-designed, celebratory wedding cakes do carry messages, and those messages could conflict with the wedding celebration. This should be clear if one imagines the effect of a disclaimer to observers. The lower court suggests Mr. Phillips' concerns would be alleviated, in part, by posting signs at his *shop* telling customers he does not agree with all the events he serves. *Craig, supra,* at 288. This seems a backhanded way to require Mr. Phillips to mark himself to the public at his shop, rather than clarify any mistake by the persons seeing and eating the cake. The equivalent to *Rumsfeld* would be the placement of signs at the place the cake is seen and eaten – the wedding celebration. And it does change the message of a wedding to have napkins with a printed disclaimer at cake line, or to have a cake tier of court-approved fine type. Even saying "this cake says nothing about this event," or "this shop does not endorse all marriages" changes the atmosphere and unified message of the celebration. [8]

Note that Mr. Phillips' cake is not merely a conduit of the couple's message; rather, by displaying a cake from Mr. Phillips, observers will expect him to have made an artwork about the couple, showing messages "worthy of presentation and...support...." *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U. S. 557, 560–565 (1995).

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[8] The lower court admits that CADA 34–601(2)(a) prohibits Masterpiece from messages that it would refuse services based on orientation; *Craig, supra,* at 277. The court seems to believe the customer or the Commission could set boundaries on the language used in a disclaimer, which compounds, not solves, the problem of compelled speech.

This goes to underline the public perception of a wedding as a place for certain messages about the newlywed couple. It is absurd to suggest a "non-endorsement" disclaimer in the receiving line, or on the cake itself, does not change the message of the cake or the celebration. The message of the wedding, the reception, and the cake are not open for competition.

C. Colorado's restrictions on Phillips fail under strict scrutiny, and reversal is necessary to protect the First Amendment rights of all Americans.

The Colorado Court of Appeals decision opens by suggesting this is a conflict between the nondiscrimination claims of Mr. Craig and Mr. Mullins on one side, and Mr. Phillips' rights on the other. *Craig, supra*, at 276. But that ignores the third party prominently featuring in the lower court's reasoning: the government. For example:

> Nothing in the record supports the conclusion that a reasonable observer would interpret Masterpiece's providing a wedding cake for a same-sex couple as an endorsement of same-sex marriage, rather than a reflection of its desire to conduct business in accordance with Colorado's public accommodations law.

Craig v. Masterpiece Cakeshop, Inc., 370 P. 3d 272, 287 (Col. App. 2015).

The most dangerous aspect of the lower court's decision is the idea that public accommodation laws somehow override *Wooley's* promise that "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse

to foster . . . an idea they find morally objectionable." *Wooley* v. *Maynard*, 430 U.S 705, 715 (1977). Instead, the Colorado Court of Appeals assumes that government can control entry to the public marketplace based on a provider's messages, and that the public will interpret Phillips' art through that lens. *Craig, supra*, at 287. The lower court quoted favorably from the portion of *Elane Photography, LLC v. Willock*, 309 P. 3d 53 (N.M. 2013), *cert. denied* 134 S. Ct. 1787 (2014), which says government may issue such rules "...if [an entrepreneur] operates a business as a public accommodation...." *Craig, supra*, at 286, *quoting Elane*, 309 P. 3d at 64. A concurring opinion in *Elane* was even more explicit: "... In short, I would say to the [operators of a public accommodation], with the utmost respect: it is the price of citizenship." *Elane, supra*, at 80 (Bosson, J., concurring).

But this Court has held the opposite. Where the "conduct" is an act of speech, the highest level of First Amendment protection applies, even to well-intentioned public accommodation laws. In *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U. S. 557, 560–565 (1995), this Court addressed a Massachusetts public accommodation law; it concerned a similar order to "cease and desist" from a state court. In that case, the organizers of Boston's St. Patrick's Day Parade were to cease and desist their rejection of a separate gay and lesbian contingent. The parade organizers - like Phillips—had not "exclude[ed] homosexual[s] as such," *id.*, at 572, but they did not wish to communicate any messages that conflicted with their "traditional and religious and social values," *id.*, at 562.

This Court recognized the danger of a broad public accommodation law which, applied "in a peculiar way," *id.*, at 572, could be read to allow "any contingent of protected individuals with a message" to override the public accommodation's message. *Ibid.* The venerable history of a public accommodation law does not allow government to undermine "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Ibid.* See also, *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U. S. 781, 786 (1988) (generalized interest in fairness not sufficient to require fundraisers to disclose percentage of funds given to charity).

A public accommodation may decide "not to propound a particular point of view," or "what merits celebration" and no matter how "misguided, or even hurtful" that decision may seem to the government, it is a decision "beyond the government's power to control." *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, *supra*, at 574–575.

The Colorado Court allows that Masterpiece has First Amendment rights, *Craig v. Masterpiece Cakeshop, Inc.*, *supra*, at 287, but relies on cases that assume commerciality erodes these rights based on the goals of the speaker. This Court has held otherwise. In the last term, this Court held in *Expressions Hair Design* that the way in which a business is required to frame its prices is a protected form of speech, not incidental conduct. *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1151 (2017). Here, the Colorado law changes the way in which Phillips must frame his artistic creations and opinions.

Similarly, in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), a state law required commercial newspapers to give a "right of reply." A politician sued after his replies to critical editorials were rejected. *Id.*, at 244. "[A]ny compulsion to publish that which 'reason' tells" a private speaker "should not be published is unconstitutional," *id.*, at 256. "Editorial control and judgment" is the speaker's choice, whether it seems "fair or unfair." *Id.*, at 259. Once again, a law restricting Philips' editorial control over his celebratory messages should have been held unconstitutional.

A similar holding was made in *Pacific Gas & Electric Co.* v. *Public Utilities Commission of California.*, 475 U. S. 1, 12 (1986). There, a public utility was ordered to include a consumer group's newsletter in billing envelopes, as the utility had previously included its own newsletters in the envelope. *Id.*, at 5–6. This Court explained that "[c]ompelled access" "penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set," *id.*, at 9. It might force them "either to appear to agree with [another's] views or to respond," *id.*, at 15. But corporations and individuals have "the choice to speak," and that choice includes "the choice of what not to say." *Id.*, at 16. Government may not "advance some points of view by burdening the expression of others." *Id.*, at 20.

Americans holding ideas "based on decent and honorable religious or philosophical premises...," *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2602 (2015), should also have the freedom to work for themselves by starting their own business. Artists who are "people of good faith," *id.*, should not be prevented

from selling their creations to the public. Yet the result of this decision, and other decisions like it, is to tar them as bigots, and declare certain kinds of work off limits to them, unless they celebrate events against their conscience, as the so-called "price of citizenship." *Elane, supra,* at 80 (Bosson, J., concurring). This is a dangerous error, blind to human aspirations to live and work consistent with faith. History is replete with laws that limited the occupations of certain religious groups. It does not matter whether those limits were claimed to arise out of animus or kindness. The First Amendment does not allow Mr. Phillips to be forced to carry the wrong message. This is *more* true, not less, when government claims that carrying such messages are the "price" to pay for owning a business.

II. The Colorado Court misinterpreted this Court's Free Exercise precedent to permit governments to compel speech and action in violation of sincerely held religious beliefs.

The court below did no better in evaluating Petitioner's free exercise claim. To be sure, *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990), teaches that rational basis scrutiny applies to some neutral and generally applicable laws that burden religious actions.

But it is erroneous to extend *Smith* to government actions that allowed government to put religious persons to a choice between their religious beliefs and the freedom to operate their own small businesses. Here, Colorado claims to control the marketplace; it cannot force Phillips to abandon or speak contrary to his religious beliefs as the price of entry. Putting him to that choice is a burden on Phillips' Free Exercise

Clause rights. *Sherbert* v. *Verner*, 374 U.S. 398, (1963); *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, *supra*; *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012 (2017).

This is apparent from historical practice as well as this Court's precedents.

A. Longstanding American tradition precludes government coercion of action that violates the actor's religious belief.

The recognition that governments may not coerce actions contrary to religious scruples began during the founding era.

A classic example of this—cited in both Justice Scalia's and Justice Stevens' opinions in *District of Columbia* v. *Heller*—is exemption from laws conscripting military service. 554 U.S. 570, 589—590 (2008); *id.* at 661 (Stevens, J., dissenting). During the founding generation, at least eight of the thirteen original state or colonial legislatures granted exemptions for religious objectors—often Quakers—from military service.[9]

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[9] 1792 Conn. Pub. Acts 429 (Oct. 11, 1792); Mass. Laws 1763, Ch. 294 (date of passage unknown); *An Act for the more Speedy Levying One Thousand or at least Eight Hundred Men Inclusive of Officers to be Employd in his Majestys Service in the Current Year* in 32 George II. Original Acts, vol. 4, p. 55; Recorded Acts, vol. 2, p. 412 (March 9, 1759) (New Hampshire); Minutes of the Provincial Congress and the Council of Safety in State of New Jersey 82 (Oct. 28, 1775), *reprinted in* 4 *American Archives* 3: 1235; *An Act to Continue an Act Entitled An Act for Regulating the Militia of the Colony of New York with Some Additions thereto*, 1757 Laws of the Colony of New York 178 [Ch. 1042]; 1770 Laws of North Carolina 787–788 (Dec. 5, 1770); *Militia Act* in 5

Later, when James Madison was president, Maryland Quakers requested a pardon for defying a state law attempting to coerce them into military service. Madison granted the pardon,[10] thereby illustrating his understanding that, absent a compelling government interest, coercive pressure to violate religious scruples contradicts our national tradition of religious freedom.

This tradition of avoiding coercion of conduct that violates religious belief is also reflected in the evidence rules of all fifty states, which date to the founding, and which hold that courts cannot force a pastor to break the priest-penitent privilege and testify in court.[11] The first such case, *People v. Phillips*, involved stolen goods recovered through a Catholic priest.[12] In an effort to punish the thief, the state sought to force the priest to testify as to who gave him the goods to return, but the priest objected.[13]

Stat. at Large of Pa. 613 (J. Mitchell & H. Flanders Comm'r. 1898) (enacted Mar. 29, 1757); Conscience in America: A Documentary History of Conscientious Objection in America, 1757–1967 28 (Lillian Schlissel, ed. 1968) citing Rufus M. Doe, The Quakers in the American Colonies 179 (1962) (Rhode Island) (date of passage unknown).

[10] James Madison, Presidential Pardon, November 20, 1816, in The Gilder Lehrman Institute of American History, *Conscientious Objectors: Madison Pardons Quakers, 1816* at 4: https://www.gilderlehrman.org/sites/default/files/inline-pdfs/00043_FPS.pdf; *id.* at 7 (reproducing original document).

[11] See Julie Ann Sippel, Priest-Penitent Privilege Statutes: Dual Protection in the Confessional, 43 CATH. U. L. REV. 1127, 1128 n. 6 (1994) (cataloging state statutes).

[12] N.Y. Ct. Gen. Sess. (1813). (This case was not officially reported, but an "editor's report" of the case is quoted in Privileged Communications to Clergymen, 1 CATH. LAW. 198 (1955)).

[13] *Id.* (1 CATH. LAW at 199–200, 207).

The New York court sustained the objection, noting that "[i]t is essential to the free exercise of a religion" that the Church "be allowed to do the sacrament of penance."[14] This founding generation court thus recognized that coercing a priest to testify would violate basic free exercise principles.

The case against Mr. Phillips falls within this tradition. Even apart from the fact that Mr. Phillips' artistry is speech, his message and actions fall within the Free Exercise Clause, which has long been held applicable to inaction as well as action. See, e.g., *Wisconsin* v. *Yoder*, 406 U.S. 205, 207 (1972) (declining to send a child to school). Long-standing tradition precludes coercing conscientious objectors to participate in military service or to divulge statements made in a confessional; that same tradition counsels strongly against coercing people like Mr. Phillips to participate in celebrations that offend their religious conscience.

B. This Court's free exercise decisions also make clear that *Smith* does not apply to government coercion of action that violates religious conscience.

Contrary to this history, the Colorado Court, among others, has interpreted *Smith* to endorse coercing an individual to use his hands, mind, and resources in violation of his religious conscience. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 289, 293–294 (Col. App. 2015); *State of Washington* v. *Arlene's Flowers, Inc., et al.*, Case No. 91615–2, Washington Sup. Ct., Feb 16, 2017, cert pending, Case No.

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[14] *Id.* (1 CATH. LAW at 207–08).

17–108; *Elane Photography, LLC v. Willock*, 309 P. 3d 53 (N.M. 2013), *cert. denied* 134 S. Ct. 1787 (2014).

The legal issue in *Smith* was different from the issue presented here and in such cases as *Arlene's Flowers* and *Elane Photography*. *Smith* addressed the question whether an action motivated by religion—there, using peyote—that violates a neutral and generally applicable law is entitled to the protection of strict scrutiny review. 491 U.S. at 890. And as this Court made clear just last Term, *Smith's* holding was limited to a determination that "the Free Exercise Clause did not entitle the church members to a special dispensation from the general criminal laws on account of their religion." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017). But *Smith* did not address the situation presented here, that is, an attempt by government, not to *prohibit* action motivated by religion, but to *coerce* a message or action that violates the actor's religious conscience.

Two terms after *Smith*, however, the Court confronted a case presenting that very issue—*Lee* v. *Weisman*, 505 U.S. 577 (1992), which involved "subtle coercive pressures" to participate in a public school graduation featuring public prayer. *Id.*, at 588. Writing for the majority, Justice Kennedy explained that both of "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Id.*, at 590. Thus, when a state seeks to subject "freedom of conscience [to] subtle coercive pressure," both religion clauses come into play. And on that basis, the Court held that the graduation arrangement violated the First Amend-

ment- even though the subtle coercive pressures to attend were applied to all students, and were thus both neutral and generally applicable. See *id.*, at 588.

Furthermore, in two other Free Exercise cases decided by this court since *Smith*—*Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520 (1993), and *Hosanna-Tabor* v. *EEOC*, 565 U.S. 171 (2012)—the Court has twice recognized that *Smith* does not always foreclose the application of strict scrutiny to free exercise claims. Both cases involved situations that were not presented in *Smith*—i.e., laws that are in form neutral and generally applicable but which are designed to target specific religious practices, and laws attempting to impose secular standards on the hiring and firing of ministerial personnel. See *Lukumi Babalu Aye*, 508 U.S. at 533–34; *Hosanna-Tabor*, 565 U.S. at 189. The Court's willingness to cabin *Smith* in those cases suggests that the Court should likewise cabin *Smith* in the situation presented here—government coercion of action that violates the actor's religiously informed conscience.

Finally, this Court's recent decision in *Trinity Lutheran* v. *Comer*, 137 S.Ct. 2012 (2017), recognizes that religious believers in America will rarely find their faith *outlawed*. But it is a longstanding principle that one cannot be put to the choice between government benefits and religious belief. *Sherbert* v. *Verner*, 374 U.S. 398 (1963), involved a forced choice between unemployment benefits and faith. *McDaniel* v. *Paty*, 435 U.S. 618 (1978), involved a forced choice between public office and faith. *Trinity Lutheran* involved a forced choice between a scrap tire rebate and faith. But in each case, this Court found

it unconstitutional to put religious believers to the choice between faith and public participation. Here, Colorado claims the authority to exclude people of good faith from this kind of business – unless they agree to offer a message with which they disagree on religious grounds. Even if the message were not speech, it would still be an act burdening the individual's Free Exercise of Religion.

The Colorado court envisions a world where government may require shedding religious belief or speech as a mere price to pay to start (or stay) in business. Religious believers can be asked to pay the price of stifling conscience or being penalized. While advertised as 'anti-discrimination' statutes, in practice, "people of good faith" whose faith does not condone same-sex marriage are excluded from owning or running a business. *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2594 (2015). The protection promised in *Obergefell* rings frighteningly hollow if those people of good faith can be excluded from even creating cakes for profit.

For reasons already explained, there is no doubt that the State of Colorado wants to coerce Phillips into acting or speaking contrary to his religious conscience. *Smith* does not apply to him any more than it would if he objected to going to war or objected to disclosing a penitent's confession. This Court should make clear that *Smith* does not apply to affirmative governmental coercion of action that violates the actor's religiously informed conscience.

C. *Yoder* provides the proper test for assessing governmental coercion of action that violates the actor's religious beliefs, and that test requires reversal of the lower court.

Rather presuming constitutionality under *Smith*, government action that coerces a person to use his person or resources in violation of his religious beliefs is subject to strict scrutiny. That was the rule this Court applied to compulsory school attendance in the pre-*Smith* case of *Wisconsin* v. *Yoder* 406 U. S. 205, 221 (1972) (analyzing compulsory attendance under the compelling interest standard). And that decision recognized that coercing religious persons to perform acts that violate their religious conscience is a "not only severe, but inescapable" burden on free exercise. *Id.*, at 218.

To be sure, *Smith* expressly limits *Yoder* to the extent it suggested that *non-coercive* government action burdening religious exercise is subject to strict scrutiny. See *Smith*, 494 U. S. at 883—890. But *Smith* did not purport to repudiate *Yoder* in its entirety.[15] Moreover, as already noted, *Smith* dealt with a specific subset of religious burdens—those in which government *prohibits* religious conduct. *Smith* did not address situations like that present here and in *Yoder*, in which the burden on religion is governmental *coercion* of action that violates the actor's con-

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[15] See *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872, 881 (1990) (*Yoder* involved "the Free Exercise Clause in conjunction with other constitutional protections" and was thus reaffirmed in *Smith* partly because of the due process right of parents to control the rearing of children).

science. *Smith* did not affect *Yoder*'s core holding that such governmental coercion is subject to strict scrutiny.

Under *Yoder*, the Free Exercise Clause requires that strict scrutiny be applied here because the state has employed the force of law to compel messages and acts that—rightly or wrongly—speakers or actors find immoral, unethical or peccable. Like the compulsion in *Yoder*, such coercion must be and is subject to strict scrutiny. Reversing the Colorado Court of Appeals is necessary to clarify the application of that core principle.

CONCLUSION

Government coercion of speech or conduct that violates the religious conscience of the speaker or actor is not only a violation of the First Amendment, it is also un-American and a gross violation of personal liberty. Any such government action must be subject to strict scrutiny. This Court should reverse the Colorado Court of Appeals' judgment and grant the relief requested by Petitioners.

Respectfully submitted,

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September 7, 2017

APPENDIX

APPENDIX A - COMPLETE LIST OF *AMICI CURIAE*

I. United States Senators (11)

Ted Cruz, lead Senate *amicus curiae*
Bill Cassidy
Steve Daines
James Inhofe
John Kennedy
James Lankford
Mike Lee
James E. Risch
Ben Sasse
Luther Strange
Roger Wicker

II. Members of the United States House of Representatives (75)

Vicky Hartzler, co-lead House *amicus curiae*
Mike Johnson, co-lead House *amicus curiae*
Ralph Abraham
Robert Aderholt
Rick Allen
Jodey Arrington
Brian Babin
Jim Banks
Joe Barton
Jack Bergman
Andy Biggs
Mike Bishop
Diane Black
Dave Brat
Michael Burgess
Clay Higgins
Bill Huizenga
Randy Hultgren
Walter B. Jones
Jim Jordan
Mike Kelly
Trent Kelly
Steve King
Raul R. Labrador
Doug LaMalfa
Doug Lamborn
Barry Loudermilk
Thomas Massie
Mark Meadows
John Moolenaar
Dan Newhouse
Kristi Noem

Bradley Byrne
Warren Davidson
Scott DesJarlais
Jeff Duncan
John J. Duncan, Jr.
Neal P. Dunn, M.D.
Blake Farenthold
Chuck Fleischmann
Bill Flores
Jeff Fortenberry
Trent Franks
Thomas Garrett
Bob Gibbs
Louie Gohmert
Paul A. Gosar
Garret Graves
Glenn Grothman
Gregg Harper
Andy Harris
Jeb Hensarling
Jody Hice
Ralph Norman
Pete Olson
Steven M. Palazzo
Gary Palmer
Scott Perry
Robert Pittenger
Keith Rothfus
David Rouzer
Steve Russell
Mark Sanford
John Shimkus
Lamar Smith
Glenn W. Thompson
Tim Walberg
Mark Walker
Randy Weber
Daniel Webster
Brad Wenstrup
Bruce Westerman
Roger Williams
Joe Wilson
Ted Yoho

APPENDIX B – PHOTOGRAPHS OF PETITIONERS' ARTISTIC PROCESS AND CREATIONS FROM MASTERPIECECAKES.COM

Fig. A[1].

[1] http://masterpiececakes.com/wp/wp-content/uploads/2017/08/Jack_Deco_2.jpg (last accessed September 2, 2017).

Fig. B.[2]

Fig. C.[3]

[2]http://masterpiececakes.com/wp/wp-content/uploads/2017/08/Wedding_Cake_2.jpg (last accessed Sept. 1, 2017)

[3] http://masterpiececakes.com/wp/wp-content/uploads/2017/08/Wedding_Cake_4.jpg (last accessed Sept. 1, 2017).